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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. ~~1109~~ 84

OBED M. LASSEN, Commissioner,
State Land Department,

Petitioner,

vs.

THE STATE OF ARIZONA, *ex rel.*
ARIZONA HIGHWAY DEPARTMENT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE STATE OF ARIZONA

DARRELL F. SMITH
THE ATTORNEY GENERAL OF ARIZONA
By Dale R. Shumway
Capitol Building
Phoenix, Arizona

and

Special Assistants
John P. Frank
900 Title & Trust Building
Phoenix, Arizona

Dix W. Price
610 Luhrs Tower
Phoenix, Arizona

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Arizona, entered in the above-entitled case on November 12, 1965.

Citations To Opinions Below

The opinion of the Supreme Court of Arizona is reported at 99 Ariz. 161, 407 P.2d 747 (1965). It is attached as Appendix B hereto.

Jurisdiction

The decision of the Supreme Court of Arizona was filed on November 12, 1965. A petition for rehearing was denied on December 14, 1965 (Appendix C). The relevant portions of the initial and responsive pleadings are attached as Appendix D and Appendix E. This Court has jurisdiction under 28 U.S.C. Sec. 1257(3). The matter was instituted as an original proceeding in the court below as an application for a writ of prohibition. The sole issue in the case is the interpretation of an Act of Con-

gress, the New Mexico-Arizona Enabling Act, June 20, 1910, Ch. 310, 36 Stat. 557, as amended, attached as Appendix A. This issue was raised in the initial pleading (the application for a writ of prohibition), and the issue has been preserved in all subsequent pleadings. The court below interpreted the Act of Congress adversely to the claim of petitioner here, and the entire opinion of that court (Appendix B, *infra*) deals with no other subject than the interpretation of the Act of Congress. The order of the court below was entered on November 12, 1965 as a part of its opinion in the case.[1]

Question Presented

Whether an Act of Congress providing that certain public lands granted to a state shall be held in trust for the benefit of public schools and other designated public purposes is violated by allowing a state highway department to take the lands for rights-of-way and material sites without compensation.

Statute Involved

The statutory provisions involved are Secs. 24 to 28 of the New-Mexico-Arizona Enabling Act of 1910, 36 Stat. 557, 572-75, as amended. The statute is set forth in Appendix A and the essential language of Sec. 28 is as follows:

"[A]ll lands hereby granted . . . shall be by the said

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[1] The court below is given the power to issue writs of prohibition by Arizona Constitution, Art. 6, Sec. 4, and A.R.S. Sec. 12-102. Although Arizona Supreme Court Rule 14(a) provides for the issuance of mandate to a trial court, the court's practice in granting a permanent writ of prohibition is simply to include the order in its opinion, as was done in the present case. There is thus no other order or judgment to be entered, and the opinion of the court below is also the order from which this petition has been taken.

State held in trust, to be disposed of in whole or in part only in manner as herein provided and for the several objects specified . . . .

"Disposition of any of said lands . . . for any object other than for which such particular lands . . . were granted or confirmed . . . shall be deemed a breach of trust . . . .

"Every sale, lease, conveyance, or contract of or concerning any of the lands hereby granted or confirmed, or the use thereof or the natural products thereof, not made in substantial conformity with the provisions of this Act shall be null and void . . . .

"Nothing herein contained shall be taken as in limitation of the power of the State or any citizen thereof to enforce the provisions of this Act."

Statement

The New Mexico-Arizona Enabling Act granted certain public lands to the then anticipated states of New Mexico and Arizona. It expressly provided that these lands should be "held in trust, to be disposed of in whole or in part" only as provided in the statute. A certain specific portion of the lands granted—certain precise sections—were granted "for the support of common schools" and it was expressly provided that "disposition of any such lands" except in accordance with the Act "shall be deemed a breach of trust." [2]

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[2] Other specific purposes provided in the statute are for: university purposes, legislative, executive, and judicial public buildings, penitentiaries, insane asylums, schools and asylums for the deaf, dumb, and blind, miners' hospitals, state charitable, penal and reformatory institutions, agricultural and me-

(Footnote continued)

As will be developed in the petition following, in other states with substantially similar provisions concerning public lands, the lands thus put in trust are held to be in trust for the specific purposes therein named; there is no exception which permits invasion of the trust because some other use not specified in the grant is also said to be "public." This, however, has not been the course of decisions in Arizona. In *Grossetta* v. *Choate*, 51 Ariz. 248, 75 P.2d 1031 (1938), the Arizona Supreme Court held that the Enabling Act did not prohibit the construction of a county highway across school lands since the Enabling Act did not limit the power of the legislature to authorize grants of right-of-way easements over public lands for public highways. In *State* v. *State Land Dept.*, 62 Ariz. 248, 156 P.2d 901 (1945), the State Land Commissioner was held not entitled to receive or collect payment for, and the Highway Department was not required to purchase or lease, school and institutional lands or their natural products used for establishment, construction, maintenance or repair of state highways. The Commissioner was required to issue, upon proper application, necessary permits to enable the Highway Department to perform its duties respecting the administration of state highways.

In 1964, the State Land Commissioner, Arizona's officer charged with the administration and protection of public

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chanical colleges, school of mines, and payment of certain county bonds, with the remainder of lands and proceeds not used for these purposes to become a part of the permanent school fund. See Sec. 25 of the Enabling Act. Of the 10,790,000 acres granted to the State for all designated uses, over 9,180,000 acres are for various educational purposes. See Arizona State Land Commissioner, Annual Report 28 (1965).

lands, issued a regulation,[3] under which highway rights-of-way and material sites might be granted by the Land Department on the basis of appraisal and payment. The Arizona Highway Department, after administrative proceedings, filed an original proceeding in the Arizona Supreme Court to prohibit the Land Commissioner from enforcing the regulation. The Supreme Court of Arizona granted the writ of prohibition on the ground that the Enabling Act did not require payment for the taking of trust lands by the Highway Department. This petition for certiorari is taken from that decision.

In the Supreme Court of Arizona, the challenging party was the State Highway Department, supported by various public utilities which contended that they also were State governmental subdivisions; the defending party was the State Land Department.[4]

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[3] The text of the regulation is:

"State and County highway Right-of-Way and Material Sites may be granted by the Department for an indefinite period for so long as used for the purpose granted after full payment of the appraised value of the Right-of-Way or Material Site has been made to the State Land Department. The appraised value of the Right-of-Way or Material Site shall be determined in accordance with the principles established in A.R.S. Sec. 12-1122."

[4] It will be observed that the contest is thus both in form and in very real substance between two different agencies of the State of Arizona, the Attorney General of the State being the common lawyer for both. Under Arizona law, the Attorney General, a county attorney, or a special counsel under the direction of the Attorney General represents the Land Department in actions relating to State lands, A.R.S. Sec. 37-102(C). The Attorney General also represents the Highway Department, A.R.S. Sec. 18-114. Where the interest of State agencies have collided, it has been held proper for the Attorney General, through his deputies, to represent both sides in the controversy; see *State v. Hunt*, 59 Ariz. 256, 129 P.2d 303, *reversed on*

(Footnote continued)

To avoid duplication, figures as to the volume of school and other lands at stake are reserved for a later section of this petition.

Reason for Granting the Writ

A. *Conflict of Authorities.*

1. The decision of the court below is in conflict with other decisions interpreting the same or similar statutes.

The essence of the decision in the instant case is that there is no "disposition" of trust lands by giving easements for highway rights-of-way and material sites. The Arizona court said: "The respective rights-of-way for these highways take less than a fee estate and there is no disposition of trust areas and the trust and its beneficiaries are not deprived of anything of value." 407 P.2d at 750. It held that the value of the land is enhanced, that there is an advantage to the trust lands by giving the rights-of-way and material sites and that therefore the Land Department has no claim on behalf of the trust.

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rehearing on other grounds, 59 Ariz. 312, 127 P.2d 130 (1942), provided that he is acting within the statutory scope of his authority. See *Arizona State Land Dept. v. McFate*, 87 Ariz. 139, 348 P.2d 912 (1960). To insure that this is an absolutely adversary proceeding, the Attorney General has appointed Mr. John P. Frank and Mr. Dix W. Price as special counsel in this cause. In addition to being an attorney, Mr. Price is the Executive Secretary of the Arizona Education Association and Mr. Frank is compensated entirely in this matter by the Arizona Education Association. The defense of the trust lands, of which school lands comprise by far the largest portion, has thus been assigned to a completely independent teachers' organization of the State with a vital interest in the future of the schools. The Arizona Education Association is the professional association of twenty-five thousand teachers and school administrators in the State, comprising eighty-five per cent of all Arizona educators. Throughout its history, the Association has acted vigilantly to protect the public trust lands. As is developed in the text, strong exponents in the court below favoring this rape of the trust lands are public utilities which anticipate extension of this privilege to themselves.

The Arizona authorities are in accord with *Ross* v. *Trustees of Univ. of Wyoming*, 30 Wyo. 433, 222 Pac. 3, *rehearing denied*, 31 Wyo. 464, 228 Pac. 642 (1924), although it should be noted that on the basis of advice received from the Attorney General of Wyoming, to be reflected in an *amicus* brief in this Court, the *Ross* case is in fact no longer being applied in Wyoming.

2. The holding of the court below is the precise opposite of *State* v. *Walker*, 61 N.M. 374, 301 P.2d 317 (1956), in which the identical questions under the identical Enabling Act were presented for decision and the opposite result reached. The court there held that the New Mexico State Highway Commission must compensate the school trust for rights-of-way and construction material that it had taken. The Supreme Court of Arizona specifically and by name rejected *State* v. *Walker*.

3. The decision further conflicts with the exceedingly analogous decision under a highly similar statute in *State Highway Comm'n* v. *State*, 70 N.D. 673, 297 N.W. 194 (1941). The issue there was whether the state highway commission could take school lands without compensation for rights-of-way in view of the provision of the Enabling Act of North Dakota that the lands were held in trust. The North Dakota court held that this amounted to a taking of property and was not permitted under the Enabling Act.[5]

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[5] The North Dakota court distinguished the prevailing Arizona decision on the ground that the taking of land for a highway in Arizona is regarded as an easement rather than as a taking of the fee itself. In view of the provisions of the Arizona Enabling Act that the land may not be disposed of "in whole or in part" except in accordance with the provisions of the Act, we regard this as an insignificant difference. This is particularly true because the New Mexico-Arizona statute provides

(Footnote continued)

4. The case further conflicts with the Nebraska rule as set forth in *State* v. *Board of Educ. Lands & Funds*, 154 Neb. 244, 47 N.W.2d 520 (1951) and *State* v. *Central Nebraska Pub. Power & Irrigation Dist.*, 143 Neb. 153, 8 N.W.2d 841 (1943). While these cases are distinguishable on details of fact, the general principle established by the Nebraska court is that the public school lands cannot be depleted and that the legislature is not authorized to make a grant of public school lands without compensation for the taking, regardless of whether the grant is in fee, as an easement, or by lease.[6]

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that "every sale, lease, conveyance or contract of or concerning any of the lands hereby granted or confirmed, or the use thereof" not made in substantial conformity with the Act shall be null and void. A more total "use" than the construction of highways upon or taking material from the trust lands can scarcely be imagined. By whatever name it is called, there is a permanence in the taking that forever makes the land unfit for any other purpose.

[6]The *Central Nebraska* case held that under the terms of the Nebraska Enabling Act, 13 Stat. 47 (1864), and of the Nebraska Constitution of 1866, Art. VII, Sec. 1, the state was under a contractual as well as a constitutional obligation to refrain from disposition or alienation of school lands except as there provided. Sec. 7 of the Nebraska Act provided that specified sections would be set aside "for the support of common schools," and the Constitution had confirmed this trust. Therefore the school fund was entitled to damages for the unauthorized taking of lands for an irrigation canal. In the *Board of Lands* case, a statute authorizing lease renewals in certain circumstances was held to violate the provisions of the Nebraska Constitution relating to the school trust, since it did not result in the most advantageous return to the trust. Thus Nebraska has clearly ecognized that the use of an interest representing less than the fee, as well as the fee itself, without full compensation to the school trust, is prohibited.

Cf. State v. Board of Educ. Lands & Funds, 159 Neb. 79, 65 N.W.2d 392 (1954), where it was held that attorneys' fees incurred in the successful prosecution of the *Board of Lands* case could not be recovered from the fund even though the fund was the incidental beneficiary, where there was no specific authorization for such allowance.

5. There is also a conflict between this case and *State* v. *District Ct.*, 42 Mont. 105, 112 Pac. 706 (1910), holding that school lands could not be condemned for dam and reservoir purposes.[7] This case was distinguished by the Arizona court in *Grossetta* v. *Choate*, 51 Ariz. at 253, 75 P.2d at 1033 (1938), solely on the ground that it involved the taking of a fee rather than of an easement.

6. Finally, the decision of the court below conflicts in principle with the decision of this Court in *Ervien* v. *United States*, 251 U.S. 41, 40 Sup.Ct. 75, 64 L.Ed. 128

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[7] Sec. 10 of the Montana Enabling Act also granted lands "for the support of common schools," and Art. 17, Sec. 1 of the Montana Constitution placed the lands in trust, to be disposed of only for the purposes for which they had been granted. Accordingly the attempted condemnation of school lands in the case of *State v. District Ct.* also was held to violate the contract between the state and the federal government; a writ of prohibition was issued to prevent further condemnation proceedings as to them. Given these constructions of the more general provisions of their Enabling Acts by the Montana and Nebraska courts, the conclusion is inescapable that the far more restrictive and detailed corresponding provisions of the Arizona Act should be given at the very least a similarly restrictive interpretation.

See also *State v. Fitzpatrick*, 5 Idaho 499, 51 Pac. 112 (1897) and *United States v. Fenton*, 27 F. Supp. 816 (D. Idaho 1939), where a similar enabling act and constitutional provisions were interpreted to prevent any dissipation of school funds or violation of the conditions of the trust. The Idaho Enabling Act, Ch. 656, 21 Stat. 215 (1890) and Idaho Constitution, Art. 9, Sec. 3, were held in *Fitzpatrick* to prevent the legislature from enacting a statute permitting forfeitures or penalties to be paid from trust funds, since under those provisions the fund must be kept "inviolate and intact." In *Fenton*, following *Fitzpatrick*, the court held that a state statute of limitations was ineffective to limit the right of the state to assert its mortgage rights in a condemnation action brought by the United States. It carefully distinguished the ability of the state to handle revenues belonging to it from the restrictions surrounding control of the common school fund, citing *Board of Comm'rs v. State*, 125 Okla. 287, 257 Pac. 778 (1926).

(1919). In *Ervien*, New Mexico had passed an act authorizing funds derived from the sale of public lands to be expended for advertising the resources and advantages of the State of New Mexico. An action was brought under the identical Enabling Act here involved to enjoin such expenditures on the grounds that the revenues from public lands could be used only for specific purposes and that it would be a breach of trust to use them for any other. This Court, in holding that the trust obligation was to be strictly construed, disposed of the matter briefly by approving of "the careful opinion of the Circuit Court of Appeals." This opinion, 246 Fed. 277 (8th Cir. 1917), reviewed the "advantage theory" which was adopted by the Supreme Court of Arizona in the instant case and rejected it, saying:

> "It would be but a step further to allow the advantage that would accrue to the trust from the physical construction of some of the attractive resources of the state that are to be advertised, *such as systems of public highways*, irrigation, public schools, and the like." *Id.* at 279-80. (Emphasis added.)

Arizona has now taken that further step. New Mexico, in *State* v. *Walker*, relied extensively on *Ervien* v. *United States* in rejecting the theory that some benefit, real or fancied, permitted invasion of the trust. (See 301 P.2d at 319-20). Arizona, while rejecting *State* v. *Walker*, has not so much as mentioned the *Ervien* case although it was repeatedly pressed in the court below.

7. The sole theory of distinction between the Arizona decision and the cases which have gone the opposite way has been a notion that somehow there is a profound legal difference between the taking of an easement, which a highway right-of-way is called in Arizona, and the taking

of fee title, as is the practice, for example, in North Dakota. This, we respectfully submit, makes a great matter depend upon the form of an incantation. The use of land for designated purposes is not rendered the more beneficial because a superhighway with tons of concrete lies upon the ground or because excavations for materials are made by virtue of an easement rather than fee title. The practical consequences are absolutely identical. The New Mexico-Arizona statute permits of no such thin evasion of the obvious purpose of the trust—it is expressly provided that the "use" of the land as much as the transfer of its fee is subject to the trust. But this specialized New Mexico-Arizona provision is not required to dispose of the general problem, for an easement is in any case, under Arizona law as elsewhere, an interest in land,[8] and the Congress has carefully avoided enacting a statute which would permit the trust to be invaded by one kind of conveyance of an interest and not another.

B. *Importance of the Issue.*

The question presented is of importance in interpreting not only the Enabling Acts of Arizona and New Mexico but of all other states which provide for public lands to be held in trust for school or other purposes.

Put at its narrowest, this matter is one of importance in the State of Arizona. The aggregate school lands in Arizona are in excess of 9,180,000 acres.[9] The acreage taken for material sites and state and federal highway purposes between 1956 and 1965 was 40,173.88 acres at

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[8] See, e. g., *Etz v. Mamerow*, 72 Ariz. 228, 233 P.2d 442 (1951); *Day v. Buckeye Water Conservation & Drainage Dist.*, 28 Ariz. 466, 237 Pac. 636 (1925).

[9] See Arizona State Land Commissioner, Annual Report 28 (1965).

a total estimated value of $9,892,700.17,[10] all of which is thus taken from the trust established by the Congress for future generations of specific classes of beneficiaries. The volume of lands involved in other states is substantial, although we have no precise figures as to its exact amount.

The matter is gaining in importance with the changing nature of highway construction. We appreciate that there is no difference in principle between an easement for a winding, unfenced dirt road across wholly undeveloped desert and an easement for a modern superhighway. Nonetheless, there is an immense practical difference, and intrusions which could perhaps be borne with tolerance in Arizona in the 1940's become intolerable in the 1960's. We deal here with great multi-laned boulevarded highways, with culverts on the sides and fences along the edge, highways which not merely rip acres out of sections, but which, because of modern limited access practices, cannot readily be crossed. We deal here also with tremendous excavations left in the land where material has been removed and transported to other locations for highway construction purposes. Whatever values these splendid new roads may have for the motoring or trucking public, they are in a major degree totally destructive of the use of the land for the primary purpose of the trust. These highways may give vast benefits, and doubtless do, to the interstate traveler but not to the land itself, which is completely destroyed in its usefulness as revenue producing acreage.

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[10] This information has been obtained from the Arizona State Land Department. At the inception of the present case, the Land Commissioner compiled a survey of the value of all State trust lands, based upon the values of adjoining lands.

But the highway takings are only a small part of what may reasonably be anticipated to follow from this decision. The *amici* below were various counties and irrigation and power districts of the state, each of which can also claim to be governmental subdivisions or institutions like the Highway Department and each of which has roads, power lines, ditches or other facilities which it wishes to run across trust lands without paying for the privilege.[11] Other state agencies as well, such as the Fish and Game Department, and the Parks Board, have expressed a desire to use the trust lands for their own purposes without compensation. Clearly, from a quantitative standpoint alone, the issue is very substantial.

C. *The Decision Below Gains Importance by the Magnitude of its Error.*

The decision below gains a portion of its importance and a portion of its "conflict" from the degree of its error. The decision violates the Enabling Act itself. The New Mexico-Arizona Enabling Act is much more elaborate and restrictive than some of its predecessors because, by the time of the admission of the 47th and 48th states, Congress had learned that public lands intended to be held for future generations faced real possibilities of

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[11] The immediacy of the interest of the *amici* below is illustrated by the 1963 agreement between the Salt River Project and the State Land Department under which the Project is presently paying under protest a rental charge on new rights-of-way across school lands pending the outcome of the test of the lawfulness of the Commissioner's regulation requiring compensation. Were a final decision entered in favor of the Highway Department, the Salt River Project and other similar utilities would assert the same power to take right-of-way easements, under the authority of A.R.S. Sec. 45-938.

dissipation. A then recent fraud in New Mexico had brought the matter into sharp focus.[12]

Thus the New Mexico-Arizona law, rather more particularly than other statutes, details just how the lands might be sold. A letter of former Secretary of Interior Garfield was quoted in Congress on the necessity for curing the situation by which other states did not "derive the full benefit to which the schools are entitled."[13] The Senate Report recorded that the statute would stiffen the provisions for school lands protection and would provide "careful and rigid, though entirely reasonable and practical, restrictions." In the language of the Report, the bill:

> "expressly declares that the land granted and confirmed to the new states shall be held in trust, to be disposed of *only as therein provided and for the several objects specified*. . . . Mortgages are entirely forbidden, and the sales or leases are required to be made to the highest bidder at a public auction, after notice by advertisement, except that these formalities are dispensed with in the case of any lease for a period of five years or less." (Emphasis added.)

This, said the Committee, was "nothing new in principle." S. Rep. No. 454, 61st Cong., 2d Sess., pp. 19-20 (1910).

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[12] See S. Rep. No. 454, 61st Cong., 2d Sess., p. 20 (1910); statement of Senator Beveridge, 45 Cong. Rec. 8225 (1910). See generally the legislative history in *Murphy v. State*, 65 Ariz. 338, 181 P.2d 336, 344-46 (1947).

[13] The reference at this point is to setting a minimum price, H. Rep. No. 152, 61st Cong., 2d Sess., p. 4 (1910). An Arizona representative at the Senate Committee hearings was expressly interrogated as to whether he accepted in behalf of his state "the careful restrictions put about the dispositions of lands" and indeed the Arizonan outdid his questioner—"I believe the restrictions on such public lands cannot be made too broad." Hearings on S. 5916 before the Senate Committee on Territories, 61st Cong., 2d Sess., p. 88 (1910).

As illustrative of the attitude taken by Congress toward the restrictions imposed by the Act, the Enabling Act was specially amended in 1935 to give to the Town of Benson, Arizona, one section of land for use as a public park (49 Stat. 798). In other words, when the Town of Benson was given 640 acres to use as a park, the Enabling Act had to be amended; yet under the present Arizona practice, forty thousand acres have been given for highways and material sites in the last ten years without any amendment to the statute and without any payment to the trust.[14]

Conclusion

The Congress of the United States has made an exceptionally earnest effort to establish public lands in trust for specifically designated public purposes, and particularly for schools. Under the decision of the court below, the future school children and beneficiaries of this trust may have the doubtful benefit of seeing the acreage intended to be preserved for them criss-crossed with highways and public utility lines. These will make

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[14] Other amendments of the Act have been made to enlarge the State's power to lease trust lands, both as to duration and to purpose. See Act of June 5, 1936, Ch. 517, 49 Stat. 1477; Act of June 2, 1951, Ch. 120, 65 Stat. 51.

The Committee Reports accompanying these amendments emphasize that the changes in the provisions regarding leases were made to overcome the restrictions in the Act, necessarily recognizing that the Act operates to prevent, without specific authorization, conveyances of less-than-fee interests in trust lands as well as conveyances of the fee. See H. Rep. 1103, 74th Cong., 1st Sess. (1935); S. Rep. No. 1939, 74th Cong., 2d Sess. (1936); S. Rep. No. 194, 82d Cong., 1st Sess. (1951); H. Rep. No. 429, 82d Cong., 1st Sess. (1951). Since an easement is also a less-than-fee interest in land, see note 8 *supra*, it follows that if conveyances of such an interest are to be allowed without compensation, a similar amendment of the Act would be required.

the land itself utterly useless for any purpose except transportation, and they are without one cent of contribution to the trust the Congress so carefully created. Such result conflicts first with the Act itself, second with the most elementary conception of a fiduciary duty, and third with the decisions as to the New Mexico-Arizona and other Enabling Acts.

It is respectfully submitted that the petition for the writ of certiorari should be granted.

Respectfully submitted,
DARRELL F. SMITH
THE ATTORNEY GENERAL
OF ARIZONA

By Dale R. Shumway
Capitol Building
Phoenix, Arizona
and
Special Assistants
John P. Frank
900 Title & Trust Building
Phoenix, Arizona

Dix W. Price
610 Luhrs Tower
Phoenix, Arizona

March, 1966.

APPENDIX A

New Mexico-Arizona Enabling Act

Sec. 24. That in addition to sections sixteen and thirty-six heretofore reserved for the Territory of Arizona, sections two and thirty-two in every township in said proposed State not otherwise appropriated at the date of the passage of this Act are hereby granted to the said State for the support of common schools; and where sections two, sixteen, thirty-two, and thirty-six, or any part thereof, are mineral, or have been sold, reserved, or otherwise appropriated or reserved by or under the authority of any Act of Congress, or are wanting or fractional in quantity, or where settlement thereon with a view to pre-emption or homestead, or improvement thereof with a view to desert-land entry has been made the survey thereof in the field, the provisions of sections twenty-two hundred and seventy-five and twenty-two hundred and seventy-six of the Revised Statutes, and Acts amendatory thereof or supplementary thereto, are hereby made applicable thereto and to the selection of lands in lieu thereof to the same extent as if sections two and thirty-two, as well as sections sixteen and thirty-six, were mentioned therein: *Provided, however,* that the area of such indemnity selections on account of any fractional township shall not in any event exceed an area which, when added to the area of the above-named sections returned by the survey as in place, will equal four sections for fractional townships containing seventeen thousand two hundred and eighty acres or more, three sections for such townships containing eleven thousand five hundred and twenty acres or more, two sections for such townships containing five thousand seven hundred and sixty acres or more, nor one section for such townships con-

taining six hundred and forty acres or more: *And provided further*, that the grants of sections two, sixteen, thirty-two, and thirty-six to said State, within national forests now existing or proclaimed, shall not vest the title to said sections in said State until the part of said national forests embracing any of said sections is restored to the public domain; but said granted sections shall be administered as a part of said forests, and at the close of each fiscal year there shall be paid by the Secretary of the Treasury to the State, as income for its common school fund, such proportion of the gross proceeds of all the national forests within said State as the area of lands hereby granted to said State for school purposes which are situated within said forest reserves, whether surveyed or unsurveyed, and for which no indemnity has been selected, may bear to the total area of said sections when unsurveyed to be determined by the Secretary of the Interior, by protraction or otherwise, the amount necessary for such payments being appropriated and made available annually from any money in the Treasury not otherwise appropriated.

Sec. 25. That in lieu of the grant of land for purposes of internal improvements made to new States by the eighth section of the Act of September fourth, eighteen hundred and forty-one, and in lieu of the swamp land grant made by the Act of September twenty-eight, eighteen hundred and fifty, and section twenty-four hundred and seventy-nine of the Revised Statutes, and in lieu of the grant of thirty thousand acres for each Senator and Representative in Congress, made by the Act of July second, eighteen hundred and three, which grants are hereby declared not to extend to the said State, the following grants are hereby made, to-wit:

For university purposes, two hundred thousand acres; for legislative, executive, and judicial public buildings heretofore erected in said Territory or to be hereafter erected in the proposed State, and for the payment of the bonds heretofore or hereafter issued therefor, one hundred thousand acres; for penitentiaries, one hundred thousand acres; for insane asylums, one hundred thousand acres; for school and asylums for the deaf, dumb, and blind, one hundred thousand acres; for miners' hospitals for disabled miners, fifty thousand acres; for normal schools, two hundred thousand acres; for state charitable, penal, and reformatory institutions, one hundred thousand acres; for agricultural and mechanical colleges, one hundred and fifty thousand acres; and the national appropriation heretofore annually paid for the agricultural and mechanical college to said Territory shall until further order of Congress, continue to be paid to said State for the use of said institution; for school of mines, one hundred and fifty thousand acres; for military institutes, one hundred thousand acres; and for the payment of the bonds and accrued interest thereon issued by Maricopa, Pima, Yavapai, and Coconino Counties, Arizona, which said bonds were validated, approved, and confirmed by the Act of Congress of June sixth, eighteen hundred and ninety-six (Twenty-ninth Statutes, page two hundred and sixty-two) one million acres: *Provided*, that if there shall remain any of the one million acres of land so granted, or of the proceeds of the sale or lease thereof, or rents, issues, or other profits therefrom, after the payment of said debts, such remainder of lands and the proceeds of sales thereof shall be added to and become a part of the permanent school fund of said State, the income therefrom only to be used for the maintenance of the common schools of said State.

Sec. 26. That the schools, colleges, and universities provided for in this Act shall forever remain under the executive control of the said State, and no part of the proceeds arising from the sale or disposal of any lands granted herein for educational purposes shall be used for the support of any sectarian or denominational school, college, or university.

Sec. 27. That five per centum of the proceeds of sales of public lands lying within said State which shall be sold by the United States subsequent to the admission of said State into the Union, after deducting all the expenses incident to such sales, shall be paid to the said State to be used as a permanent inviolable fund, the interest of which only shall be expended for the support of the common schools within said State.

Sec. 28. That it is hereby declared that all lands hereby granted, including those which, having been heretofore granted to said Territory, are hereby expressly transferred and confirmed to the said State, shall be by the said State held in trust, to be disposed of in whole or in part only in manner as herein provided and for the several objects specified in the respective granting and confirmatory provisions, and that the natural products and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same.

Disposition of any of said lands, or of any money or thing of value directly or indirectly derived therefrom, for any object other than for such particular lands, or the lands from which such money or thing of value shall have been derived, were granted or confirmed, or in any manner contrary to the provisions of this Act, shall be deemed a breach of trust.

No mortgage or other encumbrance of the said lands,

or any part thereof, shall be valid in favor of any person or for any purpose or under any circumstances whatsoever. Said lands shall not be sold or leased, in whole or in part, except to the highest and best bidder at a public auction to be held at the county seat of the county wherein the lands to be affected, or the major portion thereof, shall lie, notice of which public auction shall first have been duly given by advertisement, which shall set forth the nature, time, and place of transaction to be had, with a full description of the lands to be offered, and be published once each week for not less than ten successive weeks in a newspaper of general circulation published regularly at the state capital, and in that newspaper of like circulation which shall then be regularly published nearest to the location of the lands so offered; nor shall any sale or contract for the sale of any timber or other natural product of such lands be made, save at the place, in the manner, and after the notice by publication provided for sales and leases of the lands themselves. Nothing herein contained shall prevent: (1) the leasing of any of the lands referred to in this section, in such manner as the Legislature of the State of Arizona may prescribe, for grazing, agricultural, commercial, and domestic purposes, for a term of ten years or less; (2) the leasing of any of said lands, in such manner as the Legislature of the State of Arizona may prescribe, whether or not also leased for grazing and agricultural purposes, for mineral purposes, other than for the exploration, development, and production of oil, gas, and other hydrocarbon substances, for a term of twenty years or less; (3) the leasing of any said lands, whether or not also leased for other purposes, for the exploration, development, and production of oil, gas and other hydrocarbon substances on, in, or under

lands for an initial term of twenty years or less and as long thereafter as oil, gas, or other hydrocarbon substance may be produced therefrom in paying quantities, the leases to be made in any manner, with or without advertisement, bidding, or appraisement, and under such terms and provisions as the Legislature of the State of Arizona may prescribe, the terms and provisions to include a reservation of a royalty to said State of not less than 12½ per centum of production; or (4) the Legislature of the State of Arizona from providing by proper laws for the protection of lessees of said lands, whereby such lessees shall be protected in their rights to their improvements (including water rights) in such manner that in case of lease or sale of said lands to other parties the former lessee shall be paid by the succeeding lessee or purchaser the value of such improvements and rights placed thereon by such lessee.

All lands, leaseholds, timber and other products of land, before being offered, shall be appraised at their true value, and no sale or other disposal thereof shall be made for a consideration less than the value so ascertained, nor upon credit unless accompanied by ample security, and the legal title shall not be deemed to have passed until the consideration shall have been paid.

No lands shall be sold for less than their appraised value, and no lands which are or shall be susceptible of irrigation under any projects now or hereafter completed or adopted by the United States under legislation for the reclamation of lands, or under any other project for the reclamation of lands, shall be sold at less than twenty-five dollars per acre: *Provided*, that said State, at the request of the Secretary of the Interior, shall from time to time relinquish such of its lands to the United States as

at any time are needed for irrigation works in connection with any such government project. And other lands in lieu thereof are hereby granted to said State, to be selected from lands of the character named and in the manner prescribed in section twenty-four of this Act.

The State of Arizona is authorized to exchange any lands owned by it for other lands, public or private, under such regulations as the legislature thereof may prescribe: *Provided*, That such exchanges involving public lands may be made only as authorized by Acts of Congress and regulations thereunder.

There is hereby reserved to the United States and excepted from the operation of any and all grants made or confirmed by this act to said proposed State all land actually or prospectively valuable for the development of water power or power for hydro-electric use or transmission and which shall be ascertained and designated by the Secretary of the Interior within five years after the proclamation of the President declaring the admission of the State; and no land so reserved and excepted shall be subject to any disposition whatsoever of said State, and any conveyance or transfer of such land by said State or any officer thereof shall be absolutely null and void within the period above named; and in lieu of the land so reserved to the United States and excepted from the operation of any of said grants there be, and is hereby, granted to the proposed State and equal quantity of land to be selected from land of the character named and in the manner prescribed in section twenty-four of this Act.

A separate fund shall be established for each of the several objects for which the said grants are hereby made or confirmed, and whenever any moneys shall be

in any manner derived from any of said land the same be deposited by the state treasurer in the fund corresponding to the grant under which the particular land producing such moneys was by this Act conveyed or confirmed. No money shall ever be taken from one fund for deposit in any other, or for any object other than that for which the land producing the same was granted or confirmed. The state treasurer shall keep all such moneys invested in safe, interest-bearing securities, which securities shall be approved by the governor and secretary of state of said proposed State, and shall at all times be under a good and sufficient bond or bonds conditioned for the faithful performance of his duties in regard thereto, as defined by this Act and the laws of the State not in conflict herewith.

Every sale, lease, conveyance, or contract of or concerning any of the lands hereby granted or confirmed, or the use thereof or the natural products thereof, not made in substantial conformity with the provisions of this Act shall be null and void, any provisions of the constitution or laws of the said State to the contrary notwithstanding. It shall be the duty of the Attorney General of the United States to prosecute, in the name of the United States and in its courts, such proceedings at law or in equity as may from time to time be necessary and appropriate to enforce the provisions hereof relative to the application and disposition of the said lands and the products thereof and the funds derived therefrom.

Nothing herein contained shall be taken as in limitation of the power of the State or of any citizen thereof to enforce the provisions of this Act.

APPENDIX B

IN THE SUPREME COURT OF THE
STATE OF ARIZONA
En Banc
THE STATE OF ARIZONA, ex rel
ARIZONA HIGHWAY DEPARTMENT,
Petitioner,
v.
OBED M. LASSEN, COMMISSIONER,
STATE LAND DEPARTMENT,
Respondent.
No. 8620

Alternative Writ of Prohibition Heretofore
Issued Made Permanent

Darrell F. Smith, The Attorney General
Robert W. Pickrell, former Attorney General
Gary K. Nelson, Assistant Attorney General
Attorneys for Petitioner.
Dale R. Shumway, Special Assistant Attorney General
Attorney for Respondent.
Rex E. Lee
Jennings, Strouss, Salmon & Trask, Attorneys for
Salt River Project Agri. Improvement District
Rawlins, Ellis, Burrus & Kiewit, Attorneys for
Electrical Districts Nos. 3 & 4, Pinal County
A. Van Wagenen, Jr., Attorney for
Electrical Districts Nos. 2 & 5, Pinal County
E. Leigh Larson, County Attorney, Santa Cruz County
Westover, Copple, Keddie & Choules, Attorneys for
Welton Mohawk Irrigation & Drainage District
Richard J. Riley, County Attorney for Cochise County,
Attorneys for Amici Curiae

McFARLAND, Justice:

For over fifty years the state and county highway departments of Arizona have obtained rights of way and material sites without compensation over and on lands granted to the State of Arizona by the federal government pursuant to the Enabling Act of Arizona, June 20, 1910, c. 310, 36 U. S. Stat. 557, 568-579.

On December 14, 1964, the State Land Commissioner, hereinafter designated as Land Commissioner or respondent, after giving notice of a proposal to change the rules and regulations governing the rights of way and material sites over these lands, and holding a hearing at which petitioner appeared and filed an objection thereto, adopted the following rule designated as Rule No. 12 of the State Land Department, to-wit:

> "State and County highway Rights-of-Way and Material Sites may be granted by the Department for an indefinite period for so long as used for the purpose granted after full payment of the appraised value of the Right-of-Way or Material Site has been made to the State Land Department. The appraised value of the Right-of-Way or Material Site shall be determined in accordance with the principles established in ARS 12-1122."

Objectons were overruled. On the same day, the State Highway Department, hereinafter designated as the Department or petitioner, filed this writ of prohibition to prevent respondent from enforcing this rule. An alternative writ of prohibition was granted by this court.

The question presented in this case is whether the Land Commissioner has the authority to adopt the rule as set forth which, in effect, provides for the payment for rights of way and material sites over these trust lands by the petitioner.

The lands were granted to the State of Arizona by the federal government pursuant to the Enabling Act of Arizona, June 20, 1910. Under Sec. 24 of this act, the State was granted "in trust," certain sections of every township for the support of common schools, with the opportunity to make indemnity selections where any of the sections were lost for one or more reasons. Congress further provided, in Sec. 25 of the Enabling Act, twelve specific grants for the following purposes: university, legislative, executive and judicial, public buildings; penitentiaries; insane asylum; school and asylum for deaf, dumb and blind; miners' hospital; normal schools; state charitable, penal and reformatory institutions; agricultural and mechanical colleges; school of mines; military institutions; and county bonds. By Sec. 1, Art. 10, of the Constitution of Arizona, the people of Arizona accepted the terms of the Enabling Act.

"§ 1. Acceptance and holding of lands by state in trust

"Section 1. All lands expressly transferred and confirmed to the State by the provisions of the Enabling Act approved June 20, 1910, including all lands granted to the State and all lands heretofore granted to the Territory of Arizona, and all lands otherwise acquired by the State, shall be by the State accepted and held in trust to be disposed of in whole or in part, only in manner as in the said Enabling Act and in this Constitution provided, and for the several objects specified in the respective granting and confirmatory provisions. The natural products and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same."

Respondent claims it has this authority under Section

28 of the Enabling Act, which sets forth the rules for the administration and disposition of the "trust lands" confirmed to the State of Arizona under Sec. 24 and Sec. 25. Section 28 provides, in part:

"Sec. 28. That it is hereby declared that all lands hereby granted, including those which, having been heretofore granted to said Territory, are hereby expressly transferred and confirmed to the said State, shall be by the said State held in trust, to be disposed of in whole or in part only in manner as herein provided and for the several objects specified in the respective granting and confirmatory provisions, and that the natural products and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same.

"Disposition of any of said lands, or of any money or thing of value directly or indirectly derived therefrom, for any object other than for which particular lands, or the lands from which such money or thing of value shall have been derived, were granted or confirmed, or in any manner contrary to the provisions of this Act, shall be deemed a breach of trust.

* * *

". . . Said lands shall not be sold or leased, in whole or in part, except to the highest and best bidder at a public auction . . .

* * *

". . . nor shall any sale or contract for the sale of any timber or other natural product of such lands be made, save at the place, in the manner, and after the notice by publication provided for sales and leases of the lands themselves . . .

"A separate fund shall be established for each of the

several objects for which the said grants are hereby made or confirmed, and whenever any moneys shall be in any manner derived from any of said land the same shall be deposited by the state treasurer in the fund corresponding to the grant under which the particular land producing such moneys was by this Act conveyed or confirmed . . .

* * *

". . . It shall be the duty of the Attorney General of the United States to prosecute, in the name of the United States and in its courts, such proceedings at law or in equity as may from time to time be necessary and appropriate to enforce the provisions hereof relative to the application and disposition of the said lands and the products thereof and the funds derived therefrom."

It is the contention of the respondent that, under the terms of these rules, it is a breach of trust to allow the petitioner to use the "trust lands" without compensating the trust fund for the use thereof.

This question has been before this court on two prior occasions—the case of Grossetta v. Choate, 51 Ariz. 248, 75 P.2d 1031, and the case of State v. State Land Department, 62 Ariz. 248, 156 P.2d 901. In Grossetta, supra, the late Justice LaPrade set forth an able and scholarly history of the Enabling Act. We see no reason for trying to add to the history of this act, or the reasons as set forth in Grossetta, and State Land, supra. In the case of State v. State Land Department, supra, we said:

"The holding of this court in the case of Grossetta v. Choate, 51 Ariz. 248, 75 Pac. (2d) 1031, substantially determines all the issues herein involved. In that case, we reviewed an order of the trial court holding

that the establishment of a county highway over school land was void because the land was held in trust under the Enabling Act, and that the granting of a right-of-way thereover to a county was a violation of the Act. The judgment of the lower court was reversed, the holding being that the land department could grant a right-of-way for public highways over school land to the several counties since the Enabling Act does not limit the power of the legislature to authorize grants of right-of-way easements over public lands for public highways.

"This decision was predicated on an interpretation of Section 11-601, Arizona Code Annotated 1939. This section of the code, together with the provisions contained in Sections 11-1001, 11-1002 and 11-1003, were all enacted at the same time. See Laws of 1915 (2nd S.S.). Sections 11-1001, 11-1002 and 11-1003 were in effect at the time of the opinion and judgment in the case of Grossetta v. Choate, *Supra*. The holding in the Grossetta v. Choate, supra, case was predicated not only on the statutory provisions of Section 11-601, but also considered the restrictions of the grant in the Enabling Act.

"It is the contention of the land commissioner that this court in the Grossetta case did not pass on the question of whether such rights-of-way may be granted without compensation to the permanent fund to which he contends the lands are attached or belong.

"In the Grossetta case we cited the case of *Ross* v. *Trustees of University of Wyoming*, 30 Wyo. 433, 222 Pac. 3, and from a very lengthy opinion rendered on petition for rehearing in that case (31 Wyo. 464,

228 Pac. 642, 647), we quote with approval a portion of the opinion as applicable to the question under consideration:

"'The general provisions of the congressional granting acts and our state Constitution, limiting or conditioning the sale and disposal of the lands in question, should be reasonably construed, in view of the object of the grant, and the purpose of the restrictions. They contemplate, principally, so far as the question here is concerned, the creation and maintaining of a permanent fund, which, through proper investment, shall furnish an income to be used exclusively for University purposes, and incidentally, a fair sale at an adequate price. Unless such object or purpose is found to have become substantially impaired through granting a right of way for a county or public road, neither the act of the state making the grant nor the statute authorizing it should be held a violation of the trust upon which the land is held, or of the constitutional restrictions upon its disposal. For the natural tendency of the grant, reasonably made, across such lands, under the conditions described in the original opinion, is to enhance rather than to lessen their salable or rental value.'

"It is true that in the Grossetta case, the court did not in terms pass on the question of whether under Section 11-1001, *supra,* easements for highways could be granted over these lands without compensation. It is evident, however, that this court in the Grossetta case had in mind the undoubted right

> of the state to provide for public highways, and if such highway was for a wholly public purpose, the right of the state to use such school or institutional lands for highway rights-of-way without compensation is inferred." 62 Ariz. at 253, 156 P.2d at 903

The Land Commissioner, in his brief, contends that this court should follow the decision of the Supreme Court of New Mexico in the case of State v. Walker, 61 N.M. 374, 301 P.2d 317, rather than our own decisions, for the reason that the Enabling Acts for each state were identical. We are of the opinion that the holdings in the case of State of Arizona v. State Land Department, supra, and Grossetta v. Choate, supra, are sound, and see no reason for departing from these decisions.

The respective rights of way for these highways take less than a fee estate, and there is no disposition of the trust areas, and the trust and its beneficiaries are not deprived of anything of value. It is well known that good highways throughout a state increase the value of the lands. These lands are located throughout the state. The Land Commissioner, in his memorandum, sets forth what he states to be a fair value for these rights of way. He does not give the basis of the value, nor was it based upon evidence submitted in the case. Certainly, if the highways had not been established the values of these lands would have been much less. Nor does he state whether the values estimated are those when the easements were first granted or as of the present time, after the values have been enhanced by the building of a highway system throughout this state.

This court, in the State Land case (Conway), supra, made two fundamental determinations:

1. It was held that as a matter of law the grant of

nonrental rights of way for the purpose of constructing the kind of roads involved in that case resulted in an over-all benefit to school trust lands.

2. It was held that where there is such a benefit the State Land Department must grant the requested rights of way free of charge.

We certainly agree that, in making a determination as to whether the proposed construction would result in an over-all benefit to trust lands, such determination must be made upon all of the trust lands as a whole, rather than taking them parcel by parcel. The Land Commissioner, in his memorandum, asked the question: If highway construction by state and counties improves the lands that the highways cross, why, then, is it ever necessary for compensation to be paid to a private land owner when his land is taken? Private lands are in a different category from these trust lands. Private lands are in relatively small tracts, and the value of the right of way to the owner is frequently out of proportion to the benefit to him, while, as we have held, the determination of benefit upon trust lands is made upon the basis of whether the proposed benefit results in an over-all benefit to the trust lands as a whole. The value of these large tracts of trust lands is greatly enhanced by the building of a highway system through and to the same. The two situations are not analagous.

In the Grossetta case, supra, we said:

". . . We think the restrictions in the grant of such lands, as to their disposition or use by the state, were intended to prevent their sacrifice and to obtain for the institutions to be benefited the best and highest price obtainable, and not to prevent or impair the construction of highways necessary for

the convenience and comfort of the owners and patrons of such institutions. In *Ross v. Trustees of University of Wyoming*, 30 Wyo. 433, 222 Pac. 3, 5, the court said:

"'The questions in the case concern the right of the Legislature to give to the board of land commissioners the power which it has assumed to exercise under this statute [statute similar to our section 3005, *supra*]. We think it proper first to consider the contention that the granting of the right of way is prohibited by several provisions of the acts of Congress granting the lands to the state and of the state Constitution. [Here the court sets out the provisions of the Enabling Act with reference to the grant of land to the state of Wyoming and the terms of the acceptance of such grant, which are very much like ours.] However, we cannot for a moment believe that it was intended that the restriction on the use of the lands should interfere with the establishing of public roads across them.

"'The power of a state to provide highways for public use has been likened to the power of taxation and said to be well-nigh as essential to the existence of government. Courts do not hold that the power has been surrendered except in those cases where there appears the deliberate purpose of the state to abandon it. *Cincinnati v. Louisville & N.R. Co.*, 223 U.S. 390, 405, 32 S. Ct. 267, 56 L.Ed 481, quoting the following forceful language of Mr. Chief Justice TANEY in the *Charles River Bridge* [v. *Warren Bridge*] Case, 11 Pet. 420, 547 (9 L.Ed. 773):

> " ' "But the object and end of all government is to promote the happiness and prosperity of the community by which it is established; and it can never be assumed, that the government intended to diminish its power of accomplishing the end for which it was created. And in a country like ours, free, active, and enterprising, continually advancing in numbers and wealth, new channels of communication are daily found necessary, both for travel and trade, and are essential to the comfort, convenience, and prosperity of the people. A state ought never to be presumed to surrender this power, because, like the taxing power, the whole community have an interest in preserving it undiminished." . . . ' "51 Ariz. at 251, 75 P.2d at 1032

The Land Commissioner contends that the material sites damage the land upon which they are located. Our statutes at the time under which the State v. State Land, supra, decision was made was substantially the same as at the present time. In that case we held:

> "We do not find anywhere in the statutes that the legislature has in terms required the state to pay a rental or royalty on the sand, rock, gravel, or natural products from these lands used in the construction of highways. Nor is there any duty imposed upon the land commissioner by the law to collect such rentals or royalties." 62 Ariz. at 255, 156 P.2d at 904

There was no evidence presented in the case in regard to these material sites. It is plain that both the granting of the rights of way and the material sites enable the building of highways, and are of material benefit to the trust lands as a whole, and enhance the value thereof.

For the reasons as set forth, we hold that it is the duty of the Land Commissioner to grant, without compensation, material sites on, and easements for rights of way over state lands held in trust by virtue of the Enabling Act of Arizona.

We, therefore, order that the writ of prohibition be made permanent.

Ernest W. McFarland, Justice

CONCURRING:

Lorna E. Lockwood, Chief Justice

Charles C. Bernstein, Justice

Fred C. Struckmeyer, Jr.,
Vice Chief Justice

Howard F. Thompson, Judge

(Justice Jesse A. Udall having disqualified himself, Judge Howard F. Thompson sat in his stead.)

* * *

APPENDIX C

SUPREME COURT
STATE OF ARIZONA
PHOENIX

December 16, 1965

STATE OF ARIZONA, ex rel
ARIZONA HIGHWAY DEPARTMENT,
Petitioner,

v.

OBED M. LASSEN, Commissioner,
STATE LAND DEPARTMENT,
Respondent.

No. 8620

The following action was taken by the Supreme Court of the State of Arizona on December 14, 1965, in regard to the above-entitled cause:

"ORDER: Respondent's motion for rehearing—DENIED."

FURTHER ORDERED: Motion to file brief Amicus Curiae—DENIED."

SYLVIA HAWKINSON, Clerk
By L. Brooks
Assistant Clerk

Darrell F. Smith, Attorney General
To Attention: Dale R. Shumway [For Obed M. Lassen & State Land Dept.]

Gary K. Nelson, Assistant Attorney General [For Petitioner]

Lewis Roca Scoville Beauchamp & Linton [For Arizona Education Assn.]

Jennings Strouss Salmon & Trask [for Salt River Project Imp. Dist.]

Westover, Copple, Keddie & Choules [For Welton Mohawk I & D Dist.]

Rawlins, Ellis, Burrus & Kiewit [For Elec. Dists. Nos. 3 & 4, Pinal]

A. Van Wagenen [For Elec. Dists. Nos. 2 & 5, Pinal County]

Richard J. Riley, County Attorney Cochise County, Bisbee, Arizona

E. Leigh Larson, County Attorney Santa Cruz County, Nogales, Arizona

APPENDIX D

IN THE SUPREME COURT
OF THE STATE OF ARIZONA

NO. 8620
PETITION FOR
WRIT OF
PROHIBITION

STATE OF ARIZONA, ex rel
ARIZONA HIGHWAY
DEPARTMENT,
Petitioner,

vs.

OBED M. LASSEN, Commissioner,
STATE LAND DEPARTMENT,
Respondent.

Petitioner, by and through its attorney, Robert W. Pickrell, The Attorney General, respectfully petitions this Court for a Writ of Prohibition staying further promulgation and/or enforcement by the respondent of Rules and Regulations Governing Rights of Way, November, 1964, a true copy of which is attached hereto as Exhibit "A", insofar as they purport to require the

Petitioner to pay compensation for Rights of Way and Material Sites (see Rule 12 therein), and in support thereof states as follows:

I

The real parties in interest herein are the petitioner and the respondent.

II

This petition is brought before this court under its original jurisdiction as set forth in Art. 6, § 5, Constitution of Arizona, (as amended, November 8, 1960), and is brought initially in this court rather than in an inferior tribunal due to the nature of the controversy, the parties being two agencies of the state, and the need for an immediate clarification of a point of law, the certainty of which is essential to the continued operations of both the petitioner and respondent herein.

III

On November 19, 1964, the respondent filed in the Office of the Secretary of the State of Arizona, a notice of adoption of rules, pursuant to A. R. S. § 41-1002.

IV

Pursuant to said notice, your petitioner presented arguments, both orally and in writing at the hearing set by the respondent on December 14, 1964, at 10:00 o'clock A.M., advising him that under the law of this state he has no jurisdiction to do what he is attempting to do.

V

The respondent rejected petitioner's petition and ordered that the rules be finally adopted and enforced as written.

VI

While the Administrative Procedure Act, A. R. S. §

41-1001 et seq., provides that the validity of a rule may be tested by a declaratory judgment in the Superior Court of Maricopa County, A. R. S. § 41-1007A, it also specifically does not preclude other remedies for testing the validity of rules so promulgated (A. R. S. § 41-1007B). For the reasons and authority set forth more fully in the memorandum in support of this petition and attached hereto, in this situation, an action at law for declaratory relief could not be either speedy or adequate.

VII

The relief sought by the petitioner is clearly within the jurisdiction of this court as appears in more detail in the memorandum of authorities attached hereto. Two decisions of this court, which have not been overruled or modified by this court, or abridged by the legislature, clearly and unmistakably deny to the respondent the jurisdiction to require the State of Arizona, by and through its Highway Department, to pay compensation to respondent for rights of way and material sites in and to land under his control and jurisdiction.

WHEREFORE, petitioner prays that this court issue an Alternative Writ of Prohibition to Stay all further promulgation or enforcement, either directly or indirectly, of the rules in question pending final determination of the jurisdictional question by this court, and that by such Alternative Writ, respondent be ordered to show cause why the Alternative Writ should not be made peremptory.

DATED this 14th day of December, 1964.

Respectfully submitted,
ROBERT W. PICKRELL
The Attorney General

By: GARY K. NELSON
Gary K. Nelson
Assistant Attorney General
Attorneys for Petitioner

STATE OF ARIZONA
County of Maricopa ss.

GARY K. NELSON, being first duly sworn on oath, deposes and says: That he is a duly qualified and acting Assistant Attorney General for the State of Arizona authorized to represent the Petitioner herein; that he has read the foregoing Petition for Writ of Prohibition and knows the contents thereof; and that the information alleged therein is true to the best of his knowledge, information and belief.

GARY K. NELSON

Subscribed and sworn to before me this 14th day of December, 1964.

HARRIET D. HUNTER
Notary Public

My Commission expires Sept. 1, 1966.

APPENDIX E

IN THE SUPREME COURT
OF THE STATE OF ARIZONA

STATE OF ARIZONA, ex rel ARIZONA HIGHWAY DEPARTMENT,
Petitioner,

v.

OBED M. LASSEN, Commissioner, STATE LAND DEPARTMENT,
Respondent.

NO. 8620

RESPONSE TO PETITION FOR WRIT OF PROHIBITION

In response to the Petition for Writ of Prohibition heretofore filed in this matter, the Respondent, OBED M. LASSEN, Commissioner, State Land Department, by and through ROBERT W. PICKRELL, the Attorney General, and DALE R. SHUMWAY, Special Assistant Attorney General, alleges as follows:

I

Admits the facts as set forth in Petitioner's petition and states there are no questions of fact to be determined in this matter.

II

In addition to the facts set forth in the petition, Respondent submits the following facts which are undisputed by the Petitioner:

1. That the lands under the jurisdiction of the State Land Commissioner were granted by the United States to the State of Arizona "in trust" by an Act of Congress;

2. That the Act of Congress specified subdivisions of

the State of Arizona which would be the beneficiaries of the trust lands;

3. That for all the years since Arizona received these trust lands the Petitioner and other governmental bodies have applied for and received rights-of-way and material sites without compensating the trust therefor;

4. That the Enabling Act, the Constitution of Arizona, and the Statutes set up restrictions as to the administration and/or disposal of the trust lands.

III

The remedy sought by the Petitioner is inappropriate for either of two reasons:

1. The decisions of this court do not prohibit the requirements set forth in the new rules promulgated by the Respondent, and

2. If, as contended by the Petitioner, two decisions of this court clearly and unmistakenly deny to the Respondent the jurisdiction to require compensation for material sites and rights-of-way taken from lands under his jurisdiction, then this court should reexamine these cases in the light of the present requirements for these trust lands.

WHEREFORE, Respondent prays that the Alternative Writ of Prohibition be denied and this court allow Respondent to carry out his duties as trustee as indicated by the new rules.

Respectfully submitted this 18th day of December, 1964.

ROBERT W. PICKRELL
The Attorney General
DALE R. SHUMWAY
Special Assistant
Attorney General

Verification

STATE OF ARIZONA
County of Maricopa ss.

OBED M. LASSEN, after first being duly sworn upon oath deposes and says: that he is the Land Commissioner for the State of Arizona, that he has read the foregoing Response to Petition for Writ of Prohibition and knows the contents thereof, and that the statements contained in said Response are true of his own knowledge, information and belief.

OBED M. LASSEN
Obed M. Lassen

Subscribed and sworn to before me this 17th day of December, 1964.

BERNICE CUNUNDSON
Notary Public

My commission expires March 14, 1966.

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